Friendly Cab Company, Inc., Metro-Taxicab Company, Inc., California Cab Company, GRKWSS Enterprise, Inc., Metro-Yellow Taxicab Company and Greyline Cab Co. *and* East Bay Taxi Drivers Association *and* Brotherhood of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers and Helpers, Local No. 70, Intervenor. Case 32-CA-21613-1

April 20, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 10, 2005, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Friendly Cab Company, Inc., Metro-Taxicab Company, Inc., California Cab Company, GRKWSS Enterprise, Inc., Metro-Yellow Taxicab Company and Greyline Cab Co., a single employer, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.[1]

Dated, Washington, D.C. April 20, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] This case involves allegations that the Respondent refused to recognize and bargain with the Union as the certified representative of the Respondent's taxicab drivers. The Respondent admits that it has refused to recognize and bargain with the Union, but defends on the sole basis that the Union was improperly certified because its taxicab drivers are independent contractors and not employees. The Respondent raised the same argument in its request for review of the Regional Director's determination that the drivers were employees in the underlying representation case. *Friendly Cab Co*., 32–RC–5060. The Board granted that request for review but concluded, on the merits, that the drivers were employees and not independent contractors. *Friendly Cab Co.,* 341 NLRB No. 103 (2004).

Chairman Battista and Member Schaumber did not participate in the underlying representation case. However, they agree with the judge that the Respondent has not offered any newly discovered and previously unavailable evidence, nor alleged any special circumstances that would require the Board to reconsider its decision in the representation case. Indeed, the Respondent has merely resubmitted with its exceptions its brief to the Board in the representation case.

Jo Ellen Marcotte, Esq., for the General Counsel.
Jerrold C. Schaeffer, Esq. (Hanson Bridgett Marcus Vlahos & Rudy), of San Francisco, California, for the Respondent.
Duane B. Beeson, Esq. (Beeson, Tayer& Bodine), of Oakland, California, for the Intervenor.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on January 27, 2005. On September 8, 2004, East Bay Taxi Drivers Association (the Union) filed the charge in Case 32–CA–21613-1 alleging that Friendly Cab Company, Inc., Metro-Taxicab Company, Inc., California Cab Company, GRKWSS Enterprise, Inc., Metro-Yellow Taxicab Company, and Greyline Cab Co. (collectively called Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On November 23, 2004, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

On May 18, 2004, in Case 32–RC–5060, the Union was certified as the exclusive collective-bargaining representative of Respondent's full-time and regular part-time taxicab drivers at its 48-49 East 12th Street, Oakland, California facility.[1] This certification was based on an election held on August 13, 2002. The delay between the representation election and the certification was caused by the Respondent's request for review of the Regional Director's Decision and Direction of Election. The Regional Director held that the taxicab drivers were statutory employees and ordered a representational election. Respondent filed a timely request for review contending that the taxicab drivers were independent contractors and not statutory employees. On November 15, 2002, the Board granted the Respondent's request for review of the Regional Director's Decision. On April 30, 2004, the Board issued its Decision on Review and Order affirming the finding that the taxicab drivers at issue were employees within the meaning of Section 2(13) of the Act. See *Friendly Cab Co.*, 341 NLRB No. 103 (2004). On August 13, 2004, the Board issued an unpublished order in Case 32–RC–5060 correcting the name of the Respondent. Thereafter, on August 17, 2004, the Regional Director issued a corrected certification of representative.

The complaint alleges that the Union is the certified collective-bargaining representative of the unit of Respondent's taxicab drivers and that Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union on request. Respondent

[1] Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).

admits that it has refused to bargain with the Union but contends that the Board's certification is erroneous. Respondent contends that the taxicab drivers at issue herein are independent contractors and therefore, not statutory employees. As stated above, in its Decision on Review and Order of April 30, 2004, the Board considered this argument and found the taxicab drivers to be employees within the meaning of Section 2(3) of the Act. *Friendly Cab*, supra, 341 NLRB No. 103 (2004).

In the instant case, Respondent has refused to bargain with the Union in order to seek judicial review of the Board's April 30, 2004, Decision and Order of Certification. Section 102.67(f) of the Board's Rules and Regulations precludes relitigating "in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding." The Board has stated that "[s]ubsequent unfair labor practice cases 'related' to prior representation proceedings include not only Section 8(a)(5) refusal-to-bargain cases where there is a test of certification, but also, in appropriate circumstances, unfair labor practice cases that arise under other sections of the Act." *Hafadai Beach Hotel*, 321 NLRB 116 (1996). In the instant case, the independent contractor issue raised by the Respondent was litigated in the prior representation proceeding.[1] I therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[2] See, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, I am bound by the Board's findings in the representation case.

The parties have been afforded full opportunity to appear[3] to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs.[4] Upon the entire record, I make the following

FINDINGS OF FACT AND CONCLUSIONS

JURISDICTION

Respondent is engaged in the operation of a taxicab service for the general public. The Board found, in the underlying representation case, that Respondent is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

In the underlying representation case, the Board found that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

As stated earlier, on May 18, 2004, the Union was certified as the exclusive collective-bargaining representative of Respondent's taxicab drivers in Oakland, California.

On May 24, 2004, the Union's attorney wrote the Respondent's attorney requesting that the parties meet and negotiate regarding the terms of employment of the taxicab drivers. On June 9, Respondent's attorney responded contending that the drivers were independent contractors and that the Respondent "will not participate in this collective-bargaining process." Respondent's attorney further stated, "We intend to seek judicial review of the Board decision finding the drivers employees under the Act." Thereafter, on July 27, 2004, the Union's attorney again wrote Respondent's attorney and requested that Respondent meet and negotiate with regard to the terms and conditions of employment of the drivers. On August 16, 2004, the secretary-treasurer of Teamsters Local 70 wrote Respondent stating that [the Union] asked us to assist them in negotiating a collective-bargaining agreement with [Respondent]. The secretary-treasurer requested that Respondent begin to negotiate a collective-bargaining agreement. On August 19, Respondent's attorney replied, "It is improper to meet at this time." With this letter, Respondent's attorney enclosed a copy of his June 9 letter stating that Respondent intended to seek judicial review of the Board's finding that the drivers were employees and not independent contractors.

Conclusions

As stated above, Respondent has refused to bargain with the Union in order to seek judicial review of the Board's April 30, 2004, Decision and Order and the subsequent certification of representative. The independent contractor issue raised by the Respondent was litigated in the prior representation proceeding. Furthermore, Respondent did not offer any newly discovered and previously unavailable evidence, nor does Respondent allege any special circumstances that would require the Board to re-examine the decision made in the representation proceeding. Accordingly, the record shows that Respondent failed and refused to bargain collectively with the exclusive-bargaining representative of its taxicab drivers in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act, by failing and refusing on and after August 19, 2004, to meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease-and-desist, to meet and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, the Board shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

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[2] Furthermore, Respondent did not offer any newly discovered and previously unavailable evidence, nor does Respondent allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

[3] Teamsters Local 70 made a motion to intervene on the ground that the Union intends, after negotiation with Respondent, to merge into Teamsters Local 70. the motion to intervene was granted.

[4] None of the parties presented witnesses. Only documentary evidence was presented. The parties waived the filing of posthearing briefs.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

Respondent, Friendly Cab Company, Inc., Metro-Taxicab Company, Inc., California Cab Company, GRKWSS Enterprise, Inc., Metro-Yellow Taxicab Company, and Greyline Cab Co., a single employer, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain with East Bay Taxi Drivers Association as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effecuate the policies of the Act.

(a) On request, meet and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time taxicab drivers employed by Respondent at its 4849 East 12th Street, Oakland, California facility; excluding all other employees, office clerical employees, dispatchers, mechanics, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Oakland, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 19, 2004.

c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: February 10, 2005, San Francisco, California

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with East Bay Taxi Drivers Association as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the appropriate bargaining unit:

> All full-time and regular part-time taxicab drivers employed by Respondent at its 4849 E. 12th Street, Oakland, California facility; excluding all other employees, office clerical employees, dispatchers, mechanics, guards, and supervisors as defined in the Act.

FRIENDLY CAB COMPANY, INC, METRO-TAXICAB COMPANY, INC., CALIFORNIA CAB COMPANY, GRKWSS ENTERPRISE, INC., METRO-YELLOW TAXICAB COMPANY, AND GREYLINE CAB CO., A SINGLE EMPLOYER

[5] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. purposes...

[6] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."